IN THE HIGH COURT OF JUDICATURE FOR

RAJASTHAN AT JODHPUR

::::

O R D E R

Ex Ptr Bharta Ram Bishnoi
Vs.
Union of India & Ors.

S.B. CIVIL WRIT PETITION NO.1286/2003 UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER :: 22nd December, 2006

PRESENT

HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

REPORTABLE

Mr.S.K. Nanda, Advocate for the petitioner.
Mr.V.K. Mathur, for U.O.I.
Mrs.Prathistha Dave, Advocate for the respondents.

BY THE COURT

The petitioner in the present writ petition has prayed for a writ of mandamus directing the respondents to grant him

disability element of pension in terms of Pension Regulations and the Causality Pension Awards Rules and to pay him amount of leave encashment for 135 days together with interest @ 18% per annum.

The petitioner was enrolled in the Indian Army as an Infantry G.D. Soldier on 07th January, 1988. He upon completion of training was inducted as a Paratrooper and posted to serve at No.1 Para (SF) during the year 1989. According to the petitioner, at the time of his enrollment he was medically examined and was certified to be in medical category 'AYE' i.e. fit for all duties both in peace and War theaters at all places in India and Abroad. He served in the field as well as in operational areas during his service career till he was discharged from duties in January, 2001. When the petitioner was proceeding from LIEMAKHONG to UKHRUL for an operation alongwith other troops on 28th September, 1996 in a Military Vehicle, the said vehicle fell in the ditch resulting into commuted fracture of his left Humerus Bone. The petitioner therefore had to undergo a major surgery and his

fractured bone pieces had to be fixed with the screws. Resultantly medical category of the petitioner was lower down to 'CEE' (T) on 14th July, 1997 and subsequent period. A Court of inquiry was held to investigate under which circumstances the petitioner sustained injuries on 28th September, 1996. it concluded that the petitioner sustained the fracture while on military duty which was attributable to military service and the petitioner was not to be blamed for the same. On account of low medical category, he was reviewed from time to time and the Medical Board convened on 04th August, 1998 placed the petitioner in medical category 'BEE' (P) w.e.f. 07th August, 1998. The Medical Board further reviewed the case of the petitioner after taking X-Ray Film (left) shoulder PA View, Fracture Surgical Neck of Humerus (Old) vide Film No.1136 dated 21st February, 1998 and recommended the disability to the tune of 30% in medical category 'BEE (P)'.

It has been further contended by the petitioner that he has incurred four minor punishment entries under Section 80 of the Army Act and was issued with a show cause notice vide

H.Q. 2 Crops letter No.1451/5/CT/A1 dated 25th October, 2000 considering him to be habitual offender and requiring him to show cause as to why he should be discharged from service. The petitioner was required to file his reply within 30 days or else it would be presumed that he had nothing to offer in his defence. The petitioner submitted his reply to the show cause notice on 08th November, 2000 in which he admitted the factum with regard to four minor punishment entries but stated that unfortunately due to some domestic and psychological problems he had overstayed leave or absented without leave on four occasions and therefore was awarded minor punishments. The petitioner explained that he had a large family including aged parents to look after and had no other source of income. Having been surgically operated for shoulder joint (left) he would not be able to settle in civil job, because he could not undertake any strenuous work and therefore he prayed for being retained in service and promised to refrain from indulging in such acts and improve upon his performance. The General Officer Commanding HQ 2 Crops however was not satisfied with the reply of the petitioner and ordered him to be

discharged under Section 20(3) of the Army Act, 1950 read with Rules 13 and 17 of the rules of 1954 vide order dated 09th December, 2000. He however did not specify any date with effect from which such order was to be made effective.

The petitioner received the order of discharge some time in the third week of December, 2000. The petitioner was directed to report to Military Hospital Abala Cantt vide letter No. A 0292 dated 20th December, 2000 for release Medical Board, since he was required to be locally discharged from service. The petitioner remained as an indoor patient in Military Hospital for about four weeks. A review Medical Board was held when he was so hospitalized. His Discharge Book (IAFY – 1964) showing his personal particulars and service record of War Service/theater and operation and the particulars of Medals and the reasons for discharge and the dependent family members etc. was issued in December, 2000. Father of the petitioner made representation to the respondent No.3 requesting for release of retiral benefit of the petitioner on 25th January, 2001 followed by reminder on 03rd April, 2000, 18th

May, 2000 and 25th March, 2001. He specially replied in 21st January, 2001 stating that the case was being ascertained at their H.Q. and the reply would be forwarded. Finally a letter No.1454/4/SF/A1 dated 14th August, 2001 was sent to him informing that since the petitioner has been discharged on disciplinary grounds and not on medical grounds, his claim for payment of disability pension cannot be accepted. It was however informed that the claim of the petitioner regarding payment of Provident Fund and Army Group Insurance would be settled.

The Commanding Officer informed the Records Para Regt Bangalore (respondent No.3) vide his letter No.13617659/47/BRB/Pers dated 23rd August, 2001 that the petitioner had been discharged from service on disciplinary grounds w.e.f. 31st March, 2001 and all connected documents have already been forwarded and asked for expediting payment of outstanding dues of the petitioner. The petitioner then submitted an application on 26th September, 2001 to the Army Group Insurance Funds for release of disability benefits,

under the Army Group Insurance Scheme. The respondent No.3 however informed the petitioner vide letter No.13617659/37/AGIF/Dis dated 21st November, 2001 that the AGI Disability Cover was not available to him since he has been discharged form service being undesirable. It was informed that a sum of Rs.6800/- has been deducted from Insurance Scheme to cover next 20 years for any mis-happening. The petitioner then submitted an application on 20th December, 2001 to the Records as well as the Commanding Officer to grant him disability pension, payment of retiral benefits including service of gratuity and supply of release medical board documents. It was submitted that while the petitioner had joined the service on 07th January, 1988 in Med Cat 'AYE', he had sustained injury while on Military duty which injury was found to be attributable to Military Service and assessed to the tune of 30%. He was therefore entitled to disability pension in terms of para 173 of the Pension Regulations. Contention of the petitioner was that he having been discharged/released from hospital/unit during the third week of January, 2001, his date of discharge has wrongly been shown as 09th December,

2000 and his total period of service has also not been correctly counted. The petitioner was however informed by the respondent No.3 vide letter dated 25th January, 2002 that he was not entitled to any type of pension since the minimum qualifying service for pension was 15 years. He was later informed vide communication dated 04th February, 2002 that he had been discharged from service and occurrence to this effect has already been published in Part-II order NO.471/2000 dated 11th December, 2000 and the discharge book mentioned vide letter dated 23rd August, 2001 was done erroneously and be treated as cancelled. This order contains only one entry in respect of the petitioner and indicated the encashment of 135 days of leave when the petitioner did not receive any reply. He served a notice for demand of justice through his Advocate which was finally replied by communication dated 16th August, 2002 that the petitioner was not discharged from service on disability grounds but was so discharged having earned four red ink entries in his entire service in terms of Section 20(3) of the Army Act. He was therefore not entitled to any disability pension. The petitioner then claims to have made some more

representations and finally filed the present writ petition with the prayer extracted above.

The respondents have contested the writ petition and filed reply thereto. In the reply their categorical stand is that the petitioner was discharged from service w.e.f. 09th December, 2000 being undesirable under the provision of Army Headquarters letter dated 28th December, 1988 under Section 20(3) of the Act read with Rules 13 and 17 of the Rules on the order of General Officer Commanding 2 Crops for having earned four red ink entries. Copy of the order of the Army Headquarter dated 28th December, 1988 has been placed on record along with the reply. The details about the four red ink entries earned by the petitioner during his service career of 12 years, 8 months and 15 days has been given in para 3 of the reply which are as under:-

S.No.	Army Act Section	Nature of offence	Punishment awarded	Date of Award
(a)	AA Sec. 39 (b)	In that he overstayed leave for 62 days	(i) 28 days rigorous imprisonment (ii) 14 days pay fine	19.01.1993
(b)	AA Sec.	On 1.10.97	28 days	01.10.1997

	48	at 0530 hr he was found intoxicated and missing from PT parade	rigorous imprisonment	
(c)	AA Sec. 39 (a)	In that he absented himself from the unit lines for 38 days	28 days rigorous imprisonment	17.08.1999
(d)	AA Sec. 39 (a)	In that he absented himself from the unit lines for 08 days	28 days rigorous imprisonment	05.11.1999

Reference has been made to Army Headquarters' letter dated 28th December, 1998 which inter alia provides that an individual who has incurred four read ink entries may be discharged from service. Since the petitioner had earned four read ink entries, his matter was referred to unit i.e. 1 PARA (SF) by Para Records and accordingly he was served with a show cause notice on 25th October, 2000. Having received and considered his reply to the show cause notice, the competent authority namely General Officer Commanding 2 Crops did not find the reply satisfactory and sanctioned his discharge under the aforesaid provisions being undesirable to the organization. Subsequently, the petitioner was discharged from service w.e.f.

09th December, 2000. As regards the review Release Medical Board of the petitioner, it was submitted that the petitioner was in law medical category CEE (P) he was required to be brought before a Release Medical Board prior to his discharge from service. However his Release Medical Board was held on 06th January, 2001 and approved on 16th January, 2001 after discharge of the petitioner from service. His disability was accepted as attributable to military service and assessed at 30%. According to the respondents, he has already been paid a sum of Rs.29,068/- towards AFPP Fund, further sum of Rs.27,245/- as AGI Maturity benefits and lastly sum of Rs.13,245/- as Final settlement of account including encashment of leave salary. Since the petitioner was not discharged from service on medical ground which was one of the prerequisite conditions for entitlement to disability pension as per para 173 of the Pension Regulations of the Army, petitioner could not be paid disability pension. Similarly the petitioner was also not eligible for disability pension as per AGI letter dated 02nd May, 2001 as he was discharged being undesirable and not on medical grounds. As per Government of

India Ministry of Defence letter dated 27th March, 2001, the personnel proceeding on discharge and having rendered service below 17 years are entitled to encash only 90 days leave. In the present case, leave of the petitioner was 135 days but he was entitled to encahsment of only 90 days which was accordingly paid to him. It has been submitted that the letter dated 23rd August, 2000 was wrongly issued and therefore the same was cancelled vide subsequent letter dated 04th February, 2002 which was also intimated to the father of the petitioner vide letter dated 18th May, 2000. It has therefore been prayed that the writ petition be dismissed.

I have heard learned counsel for the parties and perused the records.

Shri S.K. Nanda, learned counsel for the petitioner argued that the denial of disability element of pension in terms of para 173 of the Pension Regulation of the Army to the petitioner was totally unjust, unfair and unreasonable, particularly when the petitioner has only been discharged and has not been

dismissed. Besides, the petitioner has been paying regular premium of Army Insurance for payment of the insurance amount, the cause of discharge can be said to be hardly relevant. He argued that the petitioner was entitled to leave encashment for the entire number of credited leave because he was neither dismissed nor was removed in terms of Section Rule 20(3) of the Act but discharged in terms of Rules 13 and 17 of the Rules.

Shri Nanda relied upon the judgment of Co-ordinate Bench of this Court in Chatar Singh vs. Union of India & Ors. in S.B. Civil Writ Petition NO.1400/1997 wherein this Court while interpreting Rule 7-B of the Regulation 1 of Entitlement Regulations (Appendix-II to the Rules of 1961) held that an individual who at the time of his release is in lower category than that in which he was recruited will be treated as invalid from service. According to him, the petitioner being lowered down to category "CEE" from "AYE" was certainly required to be treated an invalid individual.

Shri Nanda has produced photo copies of the prescriptions of treatment of the petitioner which he received in Military Hospital, Ambala in which date of the petitioner's treatment has been shown as 26th December, 2000. He has also produced copy of the Medical Board records according to which the injury of the petitioner occurred in field and was attributable to military service as per IAFI-20 dated 22nd November, 1996 and was assessed at 30%. He argued that while in the discharged certificate the date of petitioner's discharge has been shown to be 09th December, 2000 but the discharge certificate itself has been issued in the last week of December, 2000.

Shri Nanda invited my attention to the letter dated 23rd August, 2001 issued by the Records wherein it has been stated that the petitioner has been discharged from service on disciplinary grounds w.e.f. 31st March, 2001. He therefore argued that 09th March, 2000 has wrongly been recorded as the date of discharge. At this stage, he also referred to the communication dated 20th December, 2000 written by the Unit

to the Military Hospital, Ambala directing the petitioner to report to the said hospital for Release Medical Board and asking them to carry out the Release Medical Board as earliest as the petitioner was required to be discharged with the help of these two documents. Shri Nanda would like this Court to believe that accordingly it was a case of Release Medical Board which was held for discharging the petitioner on medical grounds, or else, there was no reason for holding the Release Medical Board after the petitioner had already been discharged from service. He therefore argued that once all the three ingredients of para 173 of the Pension Regulations of Army namely injury being attributable by military services, the disability pension assessed at more than 30% and discharge having been on medical grounds are established, there was no reason to deny the petitioner of his entitlement to disability pension.

On the other hand, Shri V.K. Mathur, learned Assistant Solicitor General argued that although the medical category of the petitioner was lowered down as a result of the injury

sustained by him while in military service but the petitioner was not medically boarded out from service because his discharge was made on disciplinary grounds in terms of Section 20(3) of the Army Act read with Rules 13 and 17 of the Army Rules. Those provisions were invoked with a view to discharging the petitioner because his retention in the army was considered undesirable. It was argued that the petitioner during his service career had earned four red ink entries and therefore a show cause notice was issued to him on 08th November, 2002 requiring him to explain as to why he may not be discharged from service. As regards letter dated 23rd August, 2001, the learned counsel Mr.V.K. Mathur has drawn attention of this Court towards the letter of the Unit dated 04th November, 2002 in which the petitioner was informed that he was discharged from service w.e.f. 09th December, 2000 on disability grounds and occurrence to this effect has already been notified vide Part-II of order No.471/20 dated 11th December, 2000. It was informed that the date of discharge as 31st March, 2001 was erroneously recorded in their earlier letter dated 23rd August, 2001 and therefore the same should be treated as cancelled.

As regards the convening of Release Medical Board of the petitioner after the date of his discharge, Shri V.K. Mathur has argued that the Release Medical Board is requiring to be convened in the case of every kind of discharge. He in this connection relied on the Army order dated 3/89 especially para 5 and 6 thereof which inter alis provide as under:-

> "5. All ranks admitted in hospital at the time of release will be released on due dates. Their release will not be held up on account of illness/treatment. The following procedure will be followed in their case.
>
> (a) The individual will be brought before the Medical Board on due date (AFMSF-16, 18 & 81). The medical board will assess the percentage of his disablement for a period of six months and also express an opinion regarding attributability/aggravation of the disability.
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> (b) The individual concerned will continue to receive medical treatment in the hospital even after his release/discharge from service as an ex-serviceman until medical/surgical finality is reached and he is fit to be discharged form the hospital.
>
> (c) Before final discharge from the hospital, the individual concerned is again required to be brought before a Resurvey Medical Board (AFMSF-17) in the same hospital where he is treated to assess the percentage of disablement at the time of actual discharge from the hospital.

> 6. Release Medical Board should be carried out as expeditiously as possible. The individual should not be kept in the hospital for long periods which may result in his retention in service beyond the scheduled date, which is objectionable from the audit point of view. To avoid all such embrassing situations, the OSC Unit must ensume that the individuals in low medical category are referred to the hospital for holding a release medical board at least six months prior to due date of release/retirement. In no case, the Release Medical Board will be held after the date of release/retirement. A special sanction vide Govt. of India, Ministry of Defence letter No.10(i)/87/D/Pen-C dated 13 Nov. 87 (Reproduced as an annexure to this AO) will be required to hold a Release Medical Examination/Medical Board if it has not been held prior to release/discharge due to unavoidable circumstances."

According to Shri V.K. Mathur that as per the aforesaid army order, all ranks admitted in hospital at the time of release are liable to be released on due dates. The individual concerned will continue to receive medical treatment even after his release/ discharge from service as an ex-serviceman until medical/surgical finality is reached and he is fit to be discharged from the hospital. According to him, even if a person subject to Army Act has been discharged, that does not mean that he would not be entitled to treatment as an indoor patent in medical hospital and further that he will be entitled to

receive such treatment even after discharge from service as an ex service man. Shri Mathur argued that the kind of penalties for which four red ink entries were earned by the petitioner enumerated in the show cause notice dated 25th August, 2000 would only exhibit as to what kind of soldier the petitioner was. It was therefore that according to the army instructions contained in the letter dated 28th December, 1988 (supra), the petitioner's retention in army service was considered undesirable and upon completion of the procedure provided therein, he was discharged from service. He therefore argued that the writ petition be dismissed.

I have considered the arguments advanced by learned counsel for the parties and perused the record.

Much of the arguments of petitioner are based on the dispute with regard to his actual date of discharge and subjecting him to release medical board even after 9th December, 2000. While the date of discharge has been indicated in the discharge certificate as 09th December, 2000,

the unit at one stage addressed a letter to the Records on 23rd August, 2000 wherein 31st March, 2001 was indicated as the date of discharge but this was rectified by the unit wherein they in their letter dated 04th February, 2002 addressed to the petitioner clarified that the said date was erroneously mentioned and therefore should be treated as cancelled. The petitioner himself in para 25 of the writ petition has stated this fact. Merely because unit had requested the Military Hospital, Ambala to carry out Release Medical Board of the petitioner, it does not alter basis of his discharge from service which in fact was made on disciplinary grounds. The petitioner has not been able to dispute the fact that he was discharged from service having earned four red ink entries. It has also not been disputed that a show cause notice given to him on 25th October, 2000. He duly replied to the aforesaid show cause notice but he failed to dispute the factum with regard to award of the aforesaid penalties. While first penalty was of 28 days rigorous imprisonment and 14 days pay fine which was awarded for offence of overstay of leave for 62 days punishable under Section 39-(a) of the Act, second penalty was

again 28 days rigorous imprisonment for offence under Section 48 of the Act upon the petitioner being found in the state of intoxication and absent from P.T. Parade. Third penalty was again for 28 days rigorous imprisonment on the offence of absence for 38 days under Section 39-(a) of the Act having been found proved and fourth penalty was also for 28 days rigorous imprisonment for absence of 8 days. Although the note given below Clause-F of the Army instructions dated 28th December, 1988 provide that the discharge from service consequent to four red ink entries was not mandatory or legal requirement but at the same time it provides that in such cases, the Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not be harsh with individuals specially when they are about to complete the pensionable service. But the nature of charges against the petitioner where he apart from being found guilty of intoxication was habitual in absenting from duty and repeatedly overstaying leave, it cannot be said that the satisfaction arrived at by the Commanding Officer was without any justifiable reason or was based on no material or was such

as could not on given facts have been arrived at by a reasonable and prudent man.

Release Medical Board of the petitioner even if conducted subsequent to the date of discharge would by itself not have the effect of altering the basis of the discharge which is the satisfaction of the competent authority that the further retention of the petitioner in the army services has become undesirable. It would be evident from army order referred to above that an individual subject to Army Act would continue to receive medical treatment in hospital even after his release/discharge from service as an ex service man. Mere mention of wrong date of discharge in a subsequent communication also therefore could be of no consequence. Clause 5 of the afore- quoted Army Order clearly provides that all ranks admitted in the hospital at the time of release will be released on due dates and their release will not be held up on account of illness/treatment. If the petitioner had been ordered to be discharged w.e.f. 09th December, 2001 merely because he was hospitalized and was admitted as an indoor patent in a

military hospital on that day or any other date thereafter would by itself not convert the basis for his discharge from service. The petitioner on that basis cannot be allowed to contend that his discharge owing to this reason should be deemed to have been made on medical grounds rather than for disciplinary reasons.

Coming to the entitlement of the petitioner to leave encashment, the respondents have clarified that as per the Government of India, Ministry of Defence letter dated 27th March, 2001, the personnel proceeding on discharge having rendered service below 17 years are entitled to encash only 90 days leave and therefore the petitioner could not be allowed the leave encashment for 135 days even though that was the number of days of his accumulated leave. I see no reason not to believe the correctness of such an instructions of the Government and its enforceability.

Adverting now to the claim of the petitioner for payment of Army Group Insurance benefits, it needs to be noted that

the AGI fund is a society registered under the Societies Registration Act, 1860 which carries out activities for the benefit of army personnel and their dependents. AGI fund which has been impleaded as respondent No.4 in the present writ petition has filed its separate reply. According to their contention, disability benefits are paid by the AGI Scheme entirely out of funds raised on subscriptions from its members. They do not receive any aid from Union of India. Eligibility and entitlement criteria for payment of disability benefits paid by AGI Funds are therefore different than the one applicable to payment of disability pension. The respondent No.4 has relied on Army order 27/81 and extract of AGI Funds letter 15th December, 1989 according to which disability benefits under the scheme was not available to the members of low medical category who proceed on release/discharge from service on fulfilling/completion of terms of engagement or on their own request or due to any other reason. According to them since the petitioner has been discharged from service being undesirable under Army Act and has not been discharged on medical ground therefore he would be only entitled to

admissible eligibility benefits under the scheme and which amount of Rs.27345 has already been paid to the petitioner. Apart from that, no other amount is due to be paid. A perusal of the army order 27/81 Clause 2-F would clearly reveal that the disability is required to be extended to all ranks invalidated out of service with 40% and above disability, due to attributable or non-attributable cause. Clause 2-F of the subject army order if subjected to critical examination, it would immediately become clear that all ranks invalidated out of service with 40% the above disability, due to attributable or non-attributable causes are eligible disability benefits in addition to maturity benefits. While the petitioner has been paid the maturity benefit but the disability benefits have been denied to him. Notwithstanding the fact that the petitioner was discharged from service on disciplinary grounds, it cannot be ignored that his disability was assessed at 30% and therefore in any case it would not exceed the required 40% so as to entitle him to disability benefits. He thus does not become entitled to payment of disability benefits even if other aspects of the matter are ignored. The army letter dated 15th

September, 1989 also lays down the disability being 40% and above as pre requisite condition for grant of disability benefits. In the present case admittedly disability of the petitioner having been assessed at 30%, he would not be entitled to disability benefits either.

Upshot of the above discussion, the present writ petition is dismissed with no order as to costs.

[MOHAMMAD RAFIQ],J.

AKC.